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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 44

LIVINGSTON ANTI-MERGER COMMITTEE,
Appellant,

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR GREAT NORTHERN RAILWAY COMPANY, ET AL.

ANTHONY KANE
LOUIS E. TORINUS
EARL F. REQUA
FRANK S. FARRELL
ELDON MARTIN
R. T. CUBBAGE

RICHARD J. FLYNN
1625 I Street, N.W.
Washington, D.C. 20006

HUGH B. COX
888 Sixteenth Street, N.W.
Washington, D.C. 20006

RAY GARRETT
D. ROBERT THOMAS
LEE B. MCTURNAN
11 South LaSalle Street
Chicago, Illinois 60603

Attorneys for Great Northern Railway Company, et al., Appellees

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TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR GREAT NORTHERN RAILWAY COMPANY, ET AL.

This is one of four appeals from a judgment of a three-judge District Court in the District of Columbia that unanimously sustained orders of the Interstate Commerce Commission authorizing the merger of Northern Pacific Railway Company and certain other applicant companies into the newly organized Great Northern Pacific & Burlington Lines, Inc.[1]

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[1] These appellees (Great Northern Railway Company, Northern Pacific Railway Company, Chicago, Burlington & Quincy Railroad Company, Spokane, Portland and Seattle Railway Company, Pacific Coast R.R. Co. and Great Northern Pacific & Burlington Lines, Inc.) are filing a brief in two of the other appeals, Docket Nos. 28 and 43, and a separate brief in Docket No. 38. Their brief in Nos. 28 and 43 describes the proceedings before the Commission and in the District Court. The issues herein differ from those in the other appeals.

STATEMENT

In this appeal, the Livingston Anti-Merger Committee ("Committee") attacks the authority of the Commission to consider or to approve this merger.[2] The principal ground of the Committee's argument is its claim that Northern Pacific Railway Company ("Railway") does not own the railroad franchise and properties it has possessed and operated for over 70 years but instead ownership belongs to an inactive predecessor company. The appeal presents issues quite distinct from those raised by the United States which has never questioned the Commission's jurisdiction over the merger.

Railway, a Wisconsin corporation, acquired title to the railroad, the land grant and all other properties of Northern Pacific Railroad Company ("Railroad"), a federal corporation, in foreclosure proceedings in a federal court in 1896 (App. 70). The Committee concedes that "a foreclosure proceeding took place in 1896 and as a result thereof, Railway took over Railroad's properties at foreclosure sale, and ever since used and operated the federally granted franchise and right of way as its own" (Liv. Com. Br. 11). Railroad has long been an inactive corporation, and almost all of its stock is owned by Railway.

It is apparently the Committee's contention that the Commission should have determined that the judicial foreclosure proceeding of 1896 was void and conveyed no title to Railway and that therefore the Commission had no authority to consider Railway's application for approval of the merger under Section 5(2) of the Interstate Commerce

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[2] The Committee is composed of certain individuals in Livingston and two other localities in Montana; two of its officers are employees of Northern Pacific Railway Company (App. 1002).

Act (49 U.S.C. Sec. 5(2)). In a related contention the Committee argues that the franchise and right of way allegedly belonging to Railroad cannot be included in the merger because of restraints contained in Railroad's statutory charter granted to it by Congress in 1864. The Committee also claims that the Commission and the lower court did not give adequate consideration to the foregoing contentions.[3]

The title which Railway acquired in the foreclosure proceeding has never been set aside. On the contrary, the validity of Railway's acquisition of title has been recognized in judicial proceedings in the federal courts and by the United States in opinions of two Attorneys General. (See pp. 5-9, below.) There is no suggestion that any suit to attack Railway's 73-year-old title is either pending or likely. Minority stockholders of Railroad have from time to time urged the claim to ownership now voiced by the Committee, but their claim has never succeeded and in their last effort they were held barred by laches from further suit to set aside Railway's title. *Landell* v. *Northern Pacific Railway Co.*, 122 F. Supp. 253 (D.D.C. 1954), aff'd 223 F.2d 316 (1955), *cert. denied* 350 U.S. 844.[4]

The Committee's contentions have not been accepted at

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[3] These attacks are the sole subject of the Committee's appeal. In the original Commission hearings in 1962 the Committee had opposed the merger on grounds of local job loss, economic impact and similar considerations and had introduced evidence concerning those subjects. Subsequently Railway agreed to provide job security for all employees, and the Committee has not sought in the District Court or in this Court to attack the merits of the decision permitting the merger.

[4] An attorney who had represented Railroad's minority stockholders in the unsuccessful suit in the *Landell* case to set aside Railway's title in favor of Railroad was presented as a witness for the Committee before the Commission to tender a legal memorandum (Ex. 210) attacking Railway's title.

any stage in this proceeding. They were discussed by the Examiner and found without merit (App. 1002-03, 1005-08). The Commission found that it did have authority over the proposed merger, expressly stating that the merger and related transactions "are transactions within the scope of section 5(2) of the Interstate Commerce Act" (App. 345-346).[5] The District Court held that "The Commission was not required to re-litigate the issue or to withhold approval of the merger pending possible new litigation over Northern Pacific's title. For purposes of merger proceedings it could rely on the existing judicial records in that regard, supplemented by the opinions of two Attorneys General" (App. 56-57).

ARGUMENT

I. THE MERGER AND RELATED TRANSACTIONS WERE WITHIN THE SCOPE OF THE AUTHORITY OF THE INTERSTATE COMMERCE COMMISSION.

The Commission has authority to approve the present merger notwithstanding the attack made on Railway's title by the Committee. The unquestioned fact is that the Northern Pacific properties were deeded by master's deed from Railroad to Railway as a result of the foreclosure sale in judicial foreclosure proceedings in 1896. Those proceedings occurred in the case of *Farmers Loan and Trust Co.* v. *Northern Pacific Railroad Co.* (unreported) in the United States Circuit Court for the Eastern District of Wisconsin. That title has never been set aside or divested; instead, as subsequent judicial and administrative rulings demon-

[5] In its report approving the merger, the Commission stated that contentions not specifically discussed therein, which included the Committee's claim, "have been considered and found without material significance" (App. 345).

strate, Railway's title has been repeatedly recognized in the federal courts and by the United States. For more than 70 years Railway has been in possession and control of the properties and franchises and has operated them as owner. Given these circumstances, the Committee's attack on Railway's title did not require the Commission either to adjudicate the merits of that attack or to deny its own authority until the title question had been adjudicated in some other tribunal.

The United States long ago recognized the validity of the 1896 foreclosure. Shortly after the foreclosure, some non-assenting stockholders of Railroad requested the Secretary of the Interior not to patent land-grant lands to Railway, on the ground that the foreclosure was void. The Attorney General, finding no merit in the stockholders' contention of lack of Congressional consent for the foreclosure sale to a state corporation or in their other contentions, ruled that the right of the Railroad "to the lands granted, which was perfected by the completion of its lines, passed to the purchaser under foreclosure of *all* its property and rights" (21 Op. Atty. Gen. 486 (1897)).[6] The Secretary of the Interior thereupon issued regulations recognizing Railway as "lawful successor in interest" as to all the lands of Railroad (28 Land Dec. 103 (1899); 29 Land Dec. 316 (1899)). A few years later the Railroad stockholders renewed their petition to the Secretary of the Interior, with the result that the then Attorney General, after considering a brief and oral argument by the objectors, reviewed and confirmed the opinion of his predecessor (25 Op. Atty. Gen. 401 (1905)).

This Court considered the foreclosure in *Northern Pa-*

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[6] Italics in quotations herein are added except where otherwise noted.

cific Railway Co. v. *Boyd,* 228 U.S. 482, and held that Railroad had been divested of its legal title. Boyd was an unsecured creditor of Railroad whose claim was not satisfied in connection with the foreclosure. He filed a bill against Railway based on the same theory that the Committee now presents: "[T]hat the foreclosure sale was void because made in pursuance of an illegal plan of reorganization, between bondholders and stockholders of the railroad, in which, though no provision was made for the payment of unsecured creditors, the stockholders retained their interest by receiving an equal number of shares in the new railway" (228 U.S. at 501; compare Liv. Com. Br. 22-28, 34-36).[7] The lower courts entered "a decree making Boyd's claim a lien upon the property of the rail*road* in the hands of the rail*way,* but subject to the mortgages placed thereon [by Railway] at the time of the reorganization" (228 U.S. at 501; italics in original).

This Court affirmed the decree upon grounds which establish the general validity of the foreclosure and of Railway's title. With the pertinent portions of the record of the foreclosure proceedings before it (Transcript of Record in No. 47, Oct. T. 1912, pp. 523-1392), the Court held that "the original and supplemental decrees were free from any moral or actual fraud" (228 U.S. at 502). The Court further held (contrary to the Committee's claim that the foreclosure was "of form only" (Liv. Com. Br. 21)) that reorganization of a financially embarrassed corporation "in pursuance of a private contract between bondholders and stockholders" was permissible, and that such a contract may be "consummated by a master's deed under a consent decree"

[7] The Committee notes that Boyd also urged the contention reiterated by the Committee to the effect that the mortgages foreclosed were themselves void for alleged lack of Congressional consent (Liv. Com Br. 25).

(228 U.S. at 502). Because assenting shareholders of Railroad had received shares in Railway, the portion of Railway's property representing the stockholders' equity interest was subjected to the lien of claims of creditors but the Court held Railway's title to be sound (228 U.S. at 506-507):

> "*As between the parties and the public generally, the* [*foreclosure*] *sale was valid.* As against creditors, it was a mere form. Though the *Northern Pacific Railroad was divested of the legal title,* the old stockholders were still owners of the same railroad, encumbered by the same debts."

In 1919 Congress recognized Railway's succession to the land and rights of Railroad by adoption of the Act of February 28, 1919 (40 Stat. L. 1204). The Act provided that in the adjustment of the grants to Northern Pacific Railroad Company, if any of certain described lands in Montana should be found in the hands of bona fide settlers, and should have been "adjudged by the Secretary of the Interior to inure to the Northern Pacific Railway Company under the grants made to its predecessor in interest, the Northern Pacific Railroad Company, the Northern Pacific Railway Company, upon request of the Secretary of the Interior, may file a relinquishment of said land in favor of the settler and shall then be entitled to select an equal quantity of other lands in lieu thereof . . . to which it shall receive title the same as though originally granted. . . ."

In the Act of June 25, 1929 (Liv. Com. Br. 73-78; 46 Stat. L. 41, Sec. 5), Congress authorized the Attorney General to prosecute actions on behalf of the United States "to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of" Railway or Railroad. In the course of his action, the Attorney General "alleged that the Railway Company was the successor of the Railroad," thus admitting on behalf of the United

States that the 1896 transfer of title was valid. *Schmidt* v. *United States,* 102 F.2d 589, 595 (9th Cir. 1939), *cert. denied* 308 U.S. 569. In framing the case so as to concede the validity of the foreclosure in an action to which the United States was a party, the Attorney General was held to have properly exercised authority given him by Congress. The Court of Appeals also noted that "Throughout the act [of 1929] Congress refers to the Northern Pacific Railway Company as the successor to the Northern Pacific Railroad Company" (102 F.2d at 595). When the Attorney General's action reached this Court, *United States* v. *Northern Pacific Railway Co.,* 311 U.S. 317, 328, the Court stated:

> "Pursuant to foreclosure proceedings *the Northern Pacific Railway Company acquired title to the railroad, the land grant, and all other property of the original corporation* and has since operated the road and obtained patents for millions of acres under the land grants."

Finally, stockholders of the Railroad who did not assent to the 1896 foreclosure have failed in their challenge to the 1896 foreclosure and Railway's title, and are barred from further suit. Their attempt to intervene in the Attorney General's action under the Act of June 25, 1929, was twice denied. *Schmidt* v. *United States,* 102 F.2d at 595; *United States* v. *Northern Pacific Railway Co.,* 41 F. Supp. 273, 280-283 (E.D. Wash. 1941). The stockholders' last effort was an action for declaratory judgment, wherein they sought to set aside the decrees in the 1896 foreclosure proceedings and to set aside Railway's title to its property, in favor of Railroad. The court granted defendant's motion for summary judgment on the ground of laches. *Landell*

v. *Northern Pacific Railway Co.*, 122 F. Supp. 253 (D.D.C. 1954), aff'd 223 F.2d 316 (1956), *cert. denied* 350 U.S. 844.[8]

In sum, Railway's title was achieved in a federal court foreclosure proceeding and has been recognized by the United States on several occasions. This Court has held the foreclosure valid and effectual subject only to the claims of creditors who did not assent in 1896. If any such creditors survive, the claims must long since have succumbed to limitations or laches. Railroad's stockholders, who do not in any event include the Committee, are barred from suit to challenge Railway's title. No further litigation by either creditors or stockholders posing such a challenge has ever been initiated.

In view of all of these circumstances there is no merit in the Committee's argument that the Commission lacked "jurisdiction" to consider the merger. The Act does not require the Commission to adjudicate every claim of title that is asserted against property involved in a Section 5(2) application. In the instant case, the Committee's attack on Railway's title did not affect, even remotely, the transportation problems that the Commission was required to consider in passing upon the merits of the applications. And since an order of the Commission under Section 5(2) "is permissive, not mandatory," *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 26-27, mere approval of the merger would not adjudicate title or preclude an attack on title by the Committee in some other forum if, con-

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[8] Even apart from the authorities which establish Railway's title, there is a fundamental infirmity in the claim that Railroad now owns the franchise and right of way. As the Committee notes, Railroad was indebted to the extent of at least $172 million (Liv. Com. Br. 23). These debts did not disappear into thin air. Railroad's property was taken to satisfy them in foreclosure proceedings, and it can hardly have retained title.

trary to fact, the Committee had standing to make any such attack or there were any forum which at this late date would entertain the attack.[9]

In analogous situations the Commission, with the approval of the courts, has declined to involve itself in disputes over rights to property which is the subject of applications under Section 5(2) but has left such questions to be resolved by other tribunals independently of the applications. Thus it has been held that Commission adjudication of a contract dispute affecting ownership of property involved in a Section 5(2) application is not a "condition precedent" to approval of the application. *Walker* v. *United States,* 208 F. Supp. 388, 396 (W.D. Texas 1962). And it has also been pointed out that "almost an interminable delay" would result if the Commission were required to postpone its consideration of a Section 5(2) application upon the mere assertion of an adverse claim to the property

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[9] The Committee's challenge is particularly unpersuasive in light of Railway's ownership of substantially all of Railroad's stock. On the Committee's own assumption that Railroad should be declared title owner of the franchise and right of way, they would remain under the control of Railway since it in turn controls Railroad. The Commission's broad authority under Section 5(2) is not limited to cases in which the merger applicant has title to all the property it operates; indeed, railroads frequently control important property through lease, conditional purchase and similar means. *E.g., Texas* v. *United States,* 292 U.S. 522; *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line R. Co.,* 320 I.C.C. 122, 141 (1963); *Chicago, B.&Q. R. Co.* v. *New York, S.&W.R. Co.,* 332 I.C.C. 176, 200 (1968). The properties to be included in the merger are themselves within Railway's control on any view of the matter, and if Railroad shareholders did possess any rights in such properties, they would not be disturbed by the merger. The Committee's elaborate attempt to show that ownership of these properties is not in Railway but in a company almost totally controlled by it is thus irrelevant as well as unfounded.

involved. *O. C. Wiley & Sons, Inc.* v. *United States,* 85 F. Supp. 542, 544 (W.D. Va. 1949), aff'd *per curiam* 338 U.S. 902.[10] In the instant case where there was no adverse litigation pending and where an attempt to assert such claims has been held to be barred by laches the Commission was unquestionably entitled to proceed.

II. THE MERGER AND RELATED TRANSACTIONS OF RAILWAY WERE NOT BARRED BY CHARTER PROVISIONS OF RAILROAD.

The Committee's secondary argument is that the participation of Railway in the present merger is prohibited by provisions in the statutory charter of Railroad relating to mergers and mortgages.[11] Even if the provisions were construed as restraints in the fashion urged by the Committee, its contentions still fail for two reasons: First, any such restraints necessarily give way to Sections 5(11) and 20a(7) of the Act (49 U.S.C. Secs. 5(11), 20a(7)). Second, the charter restraints on mergers and mortgages, as far as they exist at all, control only the conduct of Railroad which is not a party to the merger, and are not directed to Railway which is a participant.

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[10] See also *Watson Bros. Transp. Co.* v. *Jaffa,* 143 F.2d 340, 346 (8th Cir. 1944); *Yellow Coach Corp.—Purchase—Darnell,* 59 M.C.C. 185, 193-194 (1953); *Marion Trucking Co., Inc.—Purchase —Harwood Trucking, Inc.,* 45 M.C.C. 377, 385-386 (1947).

[11] Rights reserved by the United States with respect to uses of the railroad are not at issue. Railway acquired Railroad's title subject to the requirement of use for railroad purposes and subject to rights reserved by the United States with respect to use of the railroad for postal, military, naval and other government service. The merged company's title will be the title now held by Railway, with the same limitations as to use for railroad purposes and for the other government uses mentioned. It should be noted that the United States does not contend that merger would infringe its rights.

Section 5(11) of the Act provides that participants in a transaction approved or authorized under Section 5—such as the present merger—are "relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for. . . ." Section 20a(7) provides that the Commission's jurisdiction to authorize carrier indebtedness is also "exclusive and plenary."

As this Court stated in *Schwabacher* v. *United States*, 334 U.S. 182, 195, 197, these provisions grant the Commission "complete control of the capital structure to result from a merger" and "The jurisdiction of the Commission under both § 5 and § 20a is made plenary and exclusive and independent of all other state or federal authority." In *Schwabacher* these provisions were held to override state laws concerning the rights of dissenting stockholders in a railroad merger. Other cases have held that Commission approval permits mergers that would otherwise violate the federal antitrust laws, *Minneapolis & St. L. Ry. Co.* v. *United States*, 361 U.S. 173, 187, and that procedures for resolving labor disputes embodied in an approved merger agreement prevail over the mandatory requirements of the Railway Labor Act, *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry. Co.*, 314 F.2d 424 (8th Cir. 1963), *cert. denied* 375 U.S. 819.

Thus, any restrictions in Railroad's statutory charter—whether relating to mortgage or to merger—would be overcome by the Commission's authority under the Interstate Commerce Act. The purpose of the Act, as is apparent from its text, was to eliminate the legal hindrances to mergers found, by the agency charged with overall responsibility for administering national transportation policy,

to be in the public interest. If this authority overcomes such currently important legislation as the antitrust laws and Railway Labor Act, it assuredly suffices to overcome technical provisions in an 1864 railroad charter of a company that has been inactive for many years.

The Committee seeks to avoid the force of Sections 5(11) and 20a(7) by pointing to a 1962 statute procured by The Texas and Pacific Railway Company, amending its federal charter so as to authorize it to acquire, subject to the provisions of the Interstate Commerce Act, securities or property from any other carrier and to increase its capital stock (Liv. Com. Br. 46-48). The charter, prior to amendment, authorized the company only to make such purchases from, or consolidate with, railroads previously chartered along its route.

The Committee contends that, if the Commission's authority were "exclusive and plenary," there would have been no occasion for amendment of the Texas and Pacific charter. In fact, there was a reason for the Texas and Pacific to obtain a charter amendment. Section 5(11) operates only to immunize transactions requiring Commission approval or authorization under Section 5, and purchases of stock or property not transferring control to the purchaser would not be immunized. Consequently, the amending statute would still be required to assure that such non-control purchases would be free of any charter restraint.

In any event, it is a settled principle that the procuring and passage of legislation to make powers explicit is by itself no evidence that the powers did not already exist; on the contrary, this Court has said that such clarifying legislation is to be encouraged without the deterrence of adverse inferences such as the Committee seeks to draw. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170;

American Trucking Associations, Inc. v. *Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 418; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47.[12]

Quite apart from Section 5(11), the charter restraints which the Committee seeks to invoke impose no limitation upon Railway's participation in the merger. The original charter contained no explicit restraint on mergers at all but simply provided that any railroad holding a land grant on the route granted to Railroad could consolidate with Railroad. However the charter provision may affect Railroad,[13] a federal corporation to which the charter was given, it does not even purport to affect the rights of Railway, a Wisconsin corporation. Similarly, the limitation on mortgages in Section 10 of the charter is directed to Railroad. Nothing in that provision purports to extend it to successor companies in general or to Railway in particular and Railway has granted numerous mortgages on its property over the course of years.[14]

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[12] The Committee also argues that Section 5(11) is shown to be inapplicable by the Act of June 25, 1929 (Liv. Com. Br. 48-49, 74) which in Section 3 continued in effect the original charter's reserved power in the United States to alter, amend or repeal the charter of Railroad. This provision, which "retains for the United States the right to enact additional legislation on the subject" of its original land grants (S. Rep. No. 5, 71st Cong., 1st Sess. 3 (1929)), is in no way inconsistent with application of Section 5(11).

[13] *United States* v. *Northern Pacific R. Co.*, 95 Fed. 864, 876-877 (8th Cir. 1899), aff'd 177 U.S. 435, cited by the Committee as construing this provision, appears to hold that it was intended to assure that land grants along the right of way assigned to Railroad would remain in the hands of a single company. That result exists under the present ownership of Railway and will exist following the proposed merger.

[14] For a list of mortgage bonds issued by Railway beginning in 1896 see Appendix F to the Commission's report on reconsideration (App. 419-420).

The Committee cites *Union Pacific R. Co.* v. *Mason City & F.D.R. Co.*, 199 U.S. 160, as showing that statutory restrictions directed to a predecessor railroad company survive mortgage foreclosure proceedings and continue to apply to a successor railroad company. The case involved a statute providing that a bridge to be constructed should remain open to all railroads terminating at the bridge (199 U.S. at 166, 170). The purpose of the statute required that the obligation it imposed attach to the bridge rather than merely to its first owner and it was therefore entirely reasonable that successor railroads be required to respect the obligation. By contrast, the restrictions alleged in the present case are in terms directed to the corporate operations of Railroad as a federally chartered entity and have no application to its successor Railway whose corporate capacity is determined by the laws of Wisconsin under which it is organized.

III. THE COMMITTEE'S PROCEDURAL OBJECTIONS ARE INVALID.

The Committee contends that the Examiner and the Commission erred in requiring it to present its arguments on brief rather than as testimony of an attorney witness and that the Commission and the District Court did not give sufficient consideration to the Committee's arguments (Liv. Com. Br. 49-52).[15]

Contrary to the Committee's assertion, it was not "prevented ... from developing its case." The ruling that its proferred "testimony" was material for a brief rather than for expert testimony was clearly correct. The Committee's

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[15] The Committee's argument is largely an effort to recast and reargue its earlier contentions concerning the authority of the Commission and title and rights of Railway. As shown above, these contentions are without merit.

Exhibit 210 was a legal memorandum presenting substantially the same arguments that it presents in this Court, based on substantially the same statutes, case reports and legislative history that appear in its brief. The Committee's "expert witness" was an attorney at law (Tr. 14065). It is elementary that lawyers state their opinions of law in their briefs, not as witnesses. 7 *Wigmore on Evidence* 81 (3rd ed. 1940).

In his Recommended Report, the Examiner considered and discussed the Committee's arguments which, as he had suggested, were included in the Committee's brief. He concluded that the Committee's contentions were without merit. While the Commission's report does not repeat the discussion and conclusions of the Examiner, the Commission made the Examiner's Report a part of its order (App. 457, 496) and stated that "arguments not specifically discussed herein have been considered and found without material significance" (App. 345). There was no necessity for the Commission to repeat what its Examiner had written.[16]

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[16] "This Court and the parties to the proceeding are apprised of the basis of the Commission's decision and order by looking to the total record, including the Examiner's report and recommended order. . . . If the Examiner complied with the Administrative Procedure Act, it was useless for the Commission to restate his report and order to further particularize upon the issues." *Key* v. *United States*, 263 F. Supp. 544, 548 (S.D. Ind. 1966).

CONCLUSION

For the reasons stated above, the decision of the District Court dismissing the Committee's complaint was correct and should be affirmed.

Respectfully submitted,

ANTHONY KANE
LOUIS E. TORINUS
EARL F. REQUA
FRANK S. FARRELL
ELDON MARTIN
R. T. CUBBAGE

RICHARD J. FLYNN
1625 I Street, N.W.
Washington, D.C. 20006

HUGH B. COX
888 Sixteenth Street, N.W.
Washington, D.C. 20006

RAY GARRETT
D. ROBERT THOMAS
LEE B. MCTURNAN
11 South LaSalle Street
Chicago, Illinois 60603

Attorneys for Great Northern Railway Company, et al., Appellees

July, 1969